

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S BRIEF
AND
APPENDIX**

77-7127

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-7127

TERENCE J. MOORE

Plaintiff-Appellant

V.

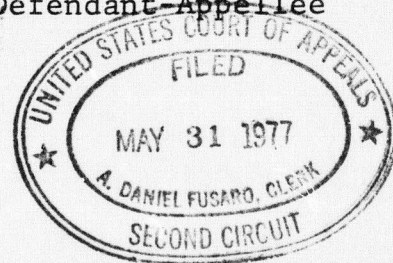
ANTHONY M. SLONIM

Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF AND APPENDIX FOR DEFENDANT-APPELLEE

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STATEMENT OF THE CASE

The defendant does not object to the plaintiff's statement of the case, except to note that on September 1, 1976, a notice was sent by the District Court Clerk's Office to Mr. Moore and Attorney Moller indicating that, among other things, oral argument, for the purpose of presenting further evidence or testimony, would not be scheduled unless requested by either side with some justification (defendant's appendix, p.1a). Neither Mr. Moore nor Attorney Moller requested such oral argument nor an opportunity to present further evidence or testimony.

ARGUMENT

1. Issues Raised Too Late

The District Court did not decide this case as a summary judgment case. Rather, it decided the case on the plaintiff's complaint. The sole "facts" that were imparted into the ruling were those that were a matter of official record in the U.S. Bankruptcy Court in Hartford; namely, that Moore was adjudicated a bankrupt on June 11, 1976, and that he failed to list this claim as a bankruptcy asset. Moore was given ample opportunity by the District Court to request an opportunity to present additional evidence or testimony if he wished to contest the official records as alleged by the defendant in his Motion to Dismiss. It is a bit late to start filing affidavits in this Court that were not made available to the District Court. The plaintiff did

file a three page motion to strike and a thirty-one page brief opposing the motion to dismiss, both of which ignored that issue; he should have disputed the bankruptcy record at that time if he thought it was material to the case.

Furthermore, the only portion of the bankruptcy record he wants to bring forward now is his amendment of July 21, 1976, listing the claim as a bankruptcy asset. How this helps his case is difficult to perceive since it is still undisputed that he voluntarily chose not to list this claim as an asset when he filed for bankruptcy on June 11, 1976, which is the critical point the District Court makes at the bottom of page 13 of the appendix. Also, since the claim was not added as an asset until the very day this law suit was instituted, the plaintiff is in no better position than he was in the District Court to claim that the trustee has abandoned the property. In any event, if the plaintiff felt the claim had been abandoned, his remedy was to petition the Bankruptcy Court for an order authorizing abandonment so that he can pursue the action. Dallas Cabana, Inc. v. Hyatt Corporation, 441 F. 2d 865, 868 (5th cir. 1971).

The plaintiff has filed another affidavit in this Court claiming that he still had not graded some papers as of June 11, 1976, and that therefore this case concerned an executory personal service contract. Once again, he is raising an issue he had ample opportunity to raise in the District Court but chose not to do so. The District Court relied on the complaint, which gives no inkling that the plaintiff is alleging an executory personal service contract. Indeed, Paragraphs 10 and 13 of the

First Count specifically refer to "back unpaid salary" and "unpaid back salary".

2. Claims Related to Contract Dispute

The brevity of this brief is not meant to suggest that the defendant takes the plaintiff's appeal lightly. Rather, the defendant does not wish to burden this Court unduly with a repetition of what the District Court has already said, or with a discussion of the self-evident general propositions which the plaintiff has reviewed at length, and which are irrelevant to the complaint before the District Court.

In addition to the District Court's stated reasons for its decision, the defendant would call this Court's attention to Footnote 3 of the District Court's opinion (appendix, 13), since a holding that the plaintiff is precluded from prosecuting an action for consequential damages when the underlying claim is vested in the trustee provides a solid alternative base for the District Court's judgment.

Patton v. Fidelity-Philadelphia Trust Co., 246 F. Supp. 1015, 1020-1021 (E.D. Pa., 1965), reviews the relevant case law and holds that any cause of action for tortious or fraudulent conduct arising out of a contractual relation also passes to the trustee. There have been two later state court cases on the subject, as noted by the District Court. The Louisiana Court of Appeals case, Wooten v. Central Mutual Insurance Co., 182 So. 2d 146 (La. App., 1966) appears to go contrary to Patton, although

it does not cite Patton or any of the earlier cases in point. This is perhaps understandable since it was only a subsidiary issue in the appeal. Wooten is found less persuasive than Patton by the California Supreme Court in Reichert v. General Insurance Company of America, 69 Cal. Rptr. 321, 442 P. 2d 377, 382-383 (1968), which also, like Patton and unlike Wooten, discusses the authorities in detail. Reichert specifically discusses and rejects the plaintiff's artful attempts to plead around the bankruptcy laws by referring to deliberate, fraudulent and oppressive conduct. 442 P. 2d at 381.

The cases principally relied on by the plaintiff simply do not involve the situation here. Asher v. Reliance Insurance Co., 308 F. Supp. 847 (D.C. Cal. 1970) has nothing to do with bankruptcy law. That a fraud action may be a tort does not avoid the holdings of Patton and Reichert. Ruebush v. Funk, 63 F. 2d 170 (4th Cir. 1933) and In re Nabors, 280 F. 943 (D.C. Ala. 1922) concerned motor vehicle accidents having nothing to do with any contractual claims. Bank of Elberton v. Swift, 268 F. 305 (not 30) (5th Cir. 1920) concerned a legacy of the bankrupt's mother, who died shortly after the petition for bankruptcy was filed; Matter of (In re) Morris and Rice, 258 F. 712 (D.C. Mass. 1919) concerned borrowed money; and Everett v. Judson, 228 U.S. 477 (1913) concerned life insurance on a person who committed suicide shortly after a petition was filed.

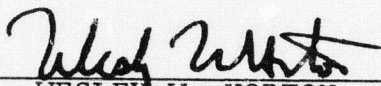
Finally, the plaintiff cites Reichert v. General Insurance Company of America as 428 P. 2d 693 (1967) (brief, 42). The actual citation is 428 P. 2d 860, but the important point is that that

decision was vacated by the later decision of the same name,
442 P. 2d 377, which has been discussed earlier in this brief.

CONCLUSION

The District Court's judgment was correct and should
be affirmed.

Respectfully submitted,

By 
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APPENDIX

UNITED STATES DISTRICT COURT
District of Connecticut
Office of the Clerk
United States Courthouse
450 Main Street
Hartford 06103
Tel. No. 244-3677
Sept. 1, 1976

Sylvester A. Markowski
Clerk

Re: DEFENDANTS MOTION TO DISMISS

NOTICE TO COUNSEL

The motion that you have filed in Civil No. H76-283, Terence J. Moore vs. Anthony M. Slonim, has been submitted to Judge Blumenfeld, to whom this case has been assigned. If not already submitted with the motion, a memorandum in support of the motion should be filed by already filed, and a memorandum in opposition to the motion should be filed by 9-10-76.

Judge Blumenfeld will not hear oral argument on motions unless counsel for either side requests, with some justification, an opportunity for oral argument in order to present additional evidence or testimony, or, if oral argument would assist the Court in arriving at a just determination of the issues because of their complexity. Requests for oral argument should be made by letter to the office of the Clerk at Hartford. If no request for oral argument has been made by 9-14-76, the motion will be

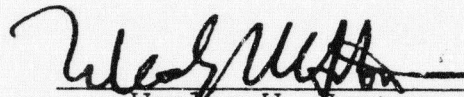
decided on the papers.

SYLVESTER A. MARKOWSKI,
Clerk

By (Ann M. Greco)
Deputy Clerk

Terence J. Moore
William Moller

I hereby certify that on May 27, 1977, I deposited in the mail, postage prepaid, two copies of the defendant's brief and appendix in Moore v. Slonim, Docket No. 77-7127, to the plaintiff, Terence J. Moore, 7105 Wilson Lane, Bethesda, Maryland, 20034.


Wesley W. Horton